FILE COPY

FILED
APR 15 1948

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1948

No. 726

RUBY JEAN GRANNIS AND THE BRANCH BANKING AND TRUST COMPANY, FAYETTEVILLE, NORTH CAROLINA, ADMINISTRATORS OF THE ESTATE OF EDWARD W. GRANNIS, DECEASED, KARL SLOAN AND WILLIAM R. JONES,

Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

Robert H. Dye
H. E. Stacy
L. P. McLendon
J. R. Nance
Attorneys for Petitioners.

Of counsel:

Claude C. Pierce, Jr.

INDEX

PAGE

Petition ---------- 1

Summary Statement of the Matter Involved ---------- 2

Jurisdiction ---------- 9

Questions Presented ---------- 9

Reasons for Granting Writ ---------- 10

Brief In Support of Petition

Specifications of Errors ---------- 13

Summary of Argument ---------- 13

ARGUMENT

I. These petitioners are entitled to a trial by jury on the question of whether they were guilty as individuals under the False Claims Statute ---------- 14

II. These petitioners are entitled to a trial by jury under the provisions of the Seventh Amendment to the Constitution of the United States since reasonable men could have and did find in their favor from the evidence produced at the trial ---------- 16

III. The Court of Appeals erred in holding that as a matter of law the failure of these petitioners, in a suit charging fraud, to take the stand or offer evidence in their own behalf was evidence of guilt ---------- 19

IV. These defendants may not be charged with liability under the False Claims Statute without a finding that all of these defendants knew the claims were false when filed or conspired to file false claims ---------- 22

V. The cause of action against the deceased defendant Grannis under the Statute abated by reason of his death after verdict and judgment in his favor and perfection of appeal by the respondent to the Court of Appeals for the Fourth Circuit ---------- 22

CONCLUSION ---------- 23

AUTHORITIES CITED

Aetna Insurance Company v. Kennedy (1937) 301 U. S. 389; 81 L. Ed. 1177 ---------- 10, 18

Baltimore & Carolina Line v. Redman (1935) 295 U. S. 654; 79 L. Ed. 1636 ---------- 10, 17

Cahill v. Curtiss-Wright Corporation (D. C., Ky., 1944) 57 F. Supp. 614 ---------- 22

Chaffee v. United States (1874) 85 U. S. 516; 21 L. Ed. 908 ---------- 11, 19

General Utilities and Operating Company v. Helvering (1935) 296 U. S. 200; 80 L. Ed. 154---- 10, 15

Gunning v. Cooley (1930) 281 U. S. 90; 74 L. Ed. 720 ---------- 10, 18

Lilienthal v. United States (1878) 97 U. S. 237; 24 L. Ed. 901 ---------- 11, 20

Richmond & Danville Railroad Company v. Powers (1893) 149 U. S. 43; 37 L. Ed. 642 ---------- 10, 19

Slocum v. New York Life Insurance Company (1913) 228 U. S. 364; 57 L. Ed. 879 ---------- 10, 16

United States ex rel Brensilber v. Bausch & Lomb Optical Company (C. A., 2, 1942) 131 F. (2d) 545, affirmed by an equally divided Supreme Court (1943) 320 U. S. 711; 88 L. Ed. 417, reh. den. (1943) 320 U. S. 814; 88 L. Ed. 492 ---- 22

United States ex rel Marcus v. Hess (1943) 317 U. S. 537; 87 L. Ed. 443 ----------8, 11, 22, 23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1948

No.

RUBY JEAN GRANNIS AND THE BRANCH BANKING AND TRUST COMPANY, FAYETTEVILLE, NORTH CAROLINA, ADMINISTRATORS OF THE ESTATE OF EDWARD W. GRANNIS, DECEASED, KARL SLOAN AND WILLIAM R. JONES,

Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, the Administrators of the Estate of Edward W. Grannis, deceased, and Karl Sloan and William R. Jones, respectfully pray for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit to review the judgment of that Court entered February 3, 1949, reversing a judgment of the District Court entered February 5, 1948, and remanding the case to the District Court with directions to enter judgment for the United States in the sum of $84,710.06. A petition for rehearing filed in the Court of Appeals was denied by said Court on March 7, 1949.

A certified copy of the record in this case, including the proceedings in the Court of Appeals is furnished herewith in accordance with Rule 38 of the Rules of this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This suit was brought in the United States District Court for the Eastern District of North Carolina by the respondent, the United States of America, against the petitioners, Edward W. Grannis, Karl Sloan and William R. Jones, to recover double damages and penalties for the alleged filing of false claims by the defendants with the respondent. The proceeding was brought under the provisions of Sections 3490 and 5438 of the Revised Statutes (Title 31 U. S. C. §231). The case was tried before a jury on January 19, 1948 to February 5, 1948. Although the complaint alleged individual violations of the statutes involved, the Trial Court submitted the case to the jury on the issue of conspiracy alone, since at the opening of the trial both counsel for the Government and the Court stated that it was was a conspiracy case. (R. 47, 67). Judgment was entered by the District Court in favor of the defendants after a favorable jury verdict (R. 49). Motions for judgment notwithstanding the verdict or in the alternative for a new trial, were filed by the United States on February 13, 1948 and denied by the Trial Court on March 23, 1948 (R. 50, 58). The respondent appealed to the Court of Appeals for the Fourth Circuit, which reversed the judgment of the Trial Court and ordered the case remanded, with directions to enter a judgment for the United States in the sum of $20,000.00 penalties and in addition the sum of $64,710.06, representing double the amount of damages found by the Court of Appeals to have been sustained by the Government, or a total of $84,710.06, together with the cost of suit

(R. 106). Although the respondent had claimed an additional 130 penalties (treating the listing of each vehicle involved as a separate act) the Court of Appeals limited the number of penalties to 10 (representing the 10 payment vouchers filed).

After the respondent had perfected an appeal to the Court of Appeals for the Fourth Circuit and before argument of the case, the defendant, Edward W. Grannis, was killed in an airplane accident on September 10, 1948. The respondent took appropriate steps in the Court of Appeals to have the record opened and substitute for the defendant, Edward W. Grannis, the Administrators of his estate. Counsel for Edward W. Grannis and the Administrators of the Estate of Edward W. Grannis, deceased, upon notice, timely moved in the Court Appeals for dismissal of the appeal against Edward W. Grannis, deceased, or in the alternative to affirm the judgment of the court below with respect to Edward W. Grannis on the grounds that the action was penal in nature or at least partially so, and had therefore abated as against Edward W. Grannis, deceased, by reason of his death on September 10, 1948 (R. 89).

Edward W. Grannis was one of the prime contractors for the construction of Camp Davis in North Carolina, an anti-aircraft training center for the United States Army (R. 2). Grannis and his co - adventurers, Mr. Higgins, Mr. Thompson and McDevitt Company on December 10, 1940 had obtained a contract No. W-6826-QM-2 with the War Department Quartermaster Corps which was then in charge of construction for the United States Army (R. 2). In connection with the obtaining of this contract, the prime contractors were required to list equipment owned by them which they had available for the job (R. 113). Mr. Grannis listed certain items of equipment, and based upon his representations and the Government's estimate as to his ability to accomplish the job,

the contract was awarded to Grannis and his co-adventurers (R. 113). Under the terms of this contract the prime contractors were required to rent equipment necessary for the job from third parties. None of these prime contractors were required to purchase additional equipment to service construction. Under the terms of third party rental agreements made by the prime contractors, third party contractors were not required to obtain cash or trade discounts allowances or rebates and pass along the benefit of such arrangements to the Government (R. 65). With respect to any supplies or equipment obtained by the prime contractors such prime contractors were naturally required to pass along the benefit of any cash or trade discounts allowances or rebates to the Government (R. 4). Under the terms of both prime contractor rental agreements and third party rental agreements, the Government was entitled to recapture or acquire title to equipment upon the payment of rentals to the amount of the agreed value of the equipment plus 1% a month (R. 63, 65). In view of the difference between the two types of contracts a third party renter was able to receive more money in rentals and upon recapture than a prime contractor who rented equipment to the Government. It is the difference between these two amounts with respect to 130 automobiles which the Court of Appeals found that the Government had been damaged.

Prior to the time Grannis entered into his contract with the Government with respect to Camp Davis, he owned "several hundred thousand dollars" in equipment leased on third party rentals in the construction of Fort Bragg at Fayetteville, North Carolina, which was known to the United States Government at the time he entered into the contract with respect to Camp Davis (R. 102). The defendant, W. R. Jones is the brother-in-law of Edward W. Grannis, deceased, and conceived the idea of purchasing equipment to be used on third party rentals at

Camp Davis. Jones was then employed by Loving and Company which was in charge of construction at Fort Bragg. Since Jones was occupied during the business day with his job at Fort Bragg, he obtained the services of Karl Sloan, a partner of the defendant Grannis, in procuring loans for him (Jones) at the local banks in Fayetteville, North Carolina in order to obtain sufficient money to purchase motor vehicles which were urgently needed on the job at Camp Davis (R. 116). The banks not only required as security chattel mortgages on the vehicles purchased, but also required a guaranty of the loans from Mr. Grannis or his partnership. Arrangements were also made that Sloan would handle the accounts at the two banks involved and Jones would not be permitted to sign checks on the accounts although the account was in his name. This arrangement was made to make sure that the rentals received from the Government were applied to pay off the loans to the bank and to assure that the loans were used in the purchase of motor vehicle equipment for use at Camp Davis (R. 117).

The defendant Grannis had attempted to interest local automobile dealers in renting equipment for use at Camp Davis. All of these dealers refused, since they were unwilling to take the risk of the certain damages which would result to such equipment because of the sandy and damp character of the terrain. Since most of these automobile dealers knew that Mr. Grannis was one of the prime contractors for the construction of Camp Davis, they naturally notified him of the availability of motor vehicles in the vicinity. Since the defendant Grannis was required to see that only usable equipment was delivered at the site of Camp Davis, both he and army officers inspected a portion of the equipment ultimately purchased by Jones and placed on third party rentals at Camp Davis. Either Grannis or Sloan arranged for the delivery of a total of 130 cars and trucks to Camp Davis for

use on the job which were purchased by the defendant Jones. Title to these automobiles was registered in the name of Jones; Jones executed the chattel mortgage on each vehicle; and Jones certified that he was the owner thereof in connection with the third party rental agreement which he entered into with the prime contractors on December 23, 1940 (R. 6, 65). This contract was approved by representatives of the Government at Camp Davis (R. 75). Certain fleet discounts amounting to $1,541.00 were obtained from the Ford Motor Company in the name of Edward W. Grannis with respect to 54 Ford trucks and automobiles. There was no evidence produced at the trial which showed that this money was actually paid to the defendant Grannis or that the defendant Jones did not receive the benefit of this rebate, even though it had been applied for in the name of the defendant Grannis (R. 66).

Under the terms of the third party rental agreement 125 of these vehicles were recaptured and title passed to the United States Government. Under the terms of third party rental agreement, as interpreted by Government witnesses and written communications from the Quartermaster Corps during the existence of the contract, Jones was permitted to use replacement value or cost new in determining the basis for rental and was not required to list the values for rental purpose of the actual amount which he paid for such vehicles (R. 62, 63). All of these vehicles were paid for out of the loans obtained from the local banks. The rental payments which the vehicles later produced were applied to pay off the loans and the profit resulting to Jones was reported in his Federal income tax returns for the years involved (R. 70). There was no evidence introduced at the trial that either Grannis or Sloan profited by these arrangements. In fact, a Government witness testified that neither Grannis nor Sloan benefited personally (R. 71). When this case was inves-

tigated by agents of the Bureau of Internal Revenue these defendants cooperated in every way possible and made all their records available to such agents. The chief investigator testified that he found "nothing wrong" with the arrangements which these defendants had made (R. 71).

The civil action here involved is the aftermath of a criminal prosecution brought by the United States Government against these same defendants under Section 5438 of the Revised Statutes (R. 61). At the criminal trial these defendants were found not guilty under the statute. All of these defendants took the stand in the criminal trial and testified, offering evidence in their own behalf (R. 110). In the trial of this civil case, since the evidence produced by the Government was contradictory and apparently was not leading to the establishment of guilt under the statute necessary for a civil recovery, the defendants and their counsel made the decision that it would be unnecessary for the defendants to take the stand or offer testimony in their own behalf. At this time counsel for the defendants were well aware of the North Carolina practice which permits to the defendants the closing address to the jury where they have not introduced evidence in their own behalf. The defendants and their counsel's estimate of the case was borne out by a verdict in their favor by the jury and the fact that the Trial Court did not upset the jury findings.

In the opinion of the Court of Appeals for the Fourth Circuit, it is stated "The unfavorable inferences against these defendants, which are justified by these facts, are fortified beyond all reasonable doubt by the failure of the defendants either to testify themselves or to offer any testimony on their own behalf" (R. 103). In other words, the Court of Appeals used the failure of the defendants to take the stand in this case as proof beyond all reasonable doubt that the defendants were guilty of fraud upon the United States Government. The opinion also states that

even if Jones technically owned the cars involved, fraud would be established since Jones enjoyed a substantial profit without actual risk or effort on his part, and that it was fraud not to disclose to Government agents these facts, in view of Grannis's promise to use his best efforts to subserve the interest in the Government in the performance of his prime contract (R. 102). This assumes that both Jones and Sloan were familiar with the provisions of Grannis's contract with the Government and would be able to anticipate the interpretation which the Court of Appeals for the Fourth Circuit put upon this contract. There was no evidence produced at the trial from which the Court of Appeals could find either that Jones or Sloan were aware of the provisions of the Grannis contract and certainly it was impossible to anticipate the interpretation of such contract by the Court of Appeals.

It is apparent from the opinion of the Court of Appeals that it assumed there was no conflict in the evidence (R. 101). This assumption is incorrect since in many instances testimony of Government witnesses is inconsistent with the findings of the trial court. For example five auto dealers upon cross-examination testified either that their cars were "sold" to Jones or that titles to the cars upon sale were issued in the name of Jones or that their cars were paid for by a check issued in the name of Jones (Trial Tr. 175, 183, 190, 222, 231).

The Court of Appeals treated the motion of petitioners to dismiss the appeal on the grounds that the action against the deceased defendant Grannis had abated by reason of his death as a "special defense" (R. 103). Relying upon *United States ex rel Marcus* v. *Hess* (1943) 317 U. S. 537; 87 L. Ed. 443, the Court of Appeals held that the civil action under the False Claims Statute is remedial in nature and is not a penal statute and that there was no abatement of the action, *in toto* or partially, as against the defendant Grannis by reason of his death (R. 103, 104).

JURISDICTION

This suit arises under the False Claims Statute, Sections 3490 and 5438 of Revised Statutes (Title 31 U. S. C. §231).

The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254 (1).

The District Court rendered no opinion and merely entered judgment on the verdict and an order denying respondent's motion for judgment notwithstanding the verdict or in the alternative a new trial (R. 49, 58).

The opinion of the Court of Appeals is reported at 172 F. (2d) 507.

QUESTIONS PRESENTED

1. Did the Court of Appeals deprive these defendants of their right to trial by jury preserved to them under the provisions of the Seventh Amendment to the Constitution of the United States, since that Court apparently found these defendants guilty of individual violations of the Statute when the case was tried solely on the conspiracy issue in the Trial Court?

2. Did the Court of Appeals deprive these defendants of their right to trial by jury preserved to them by the Seventh Amendment to the Constitution of the United States, since there was evidence produced at the trial by Government witnesses upon which a verdict in favor of the defendants could be based?

3. Does the Court of Appeals have power to direct the entry of judgment in favor of the plaintiff where reasonable men could draw a different conclusion from the evidence produced at the trial?

4. Did the Court of Appeals err in holding that the failure of these defendants to take the stand and testify in their own behalf or offer testimony proves beyond all reasonable doubt their guilt under the Statute?

5. Does the Court of Appeals have power to direct a judgment for the Government under the False Claims

Statute where the Court of Appeals has failed to make an express finding that each defendant had knowledge that the claims were false when filed?

6. Did the Court of Appeals err in holding that the action with respect to the defendant Grannis did not abate *in toto* or partially, by reason of his death after judgment and verdict in his favor in the Trial Court and appeal to the Court of Appeals?

REASONS FOR GRANTING THE WRIT

Your petitioners respectfully pray that the Writ be allowed for the following reasons:

1. The decision of the Court of Appeals for the Fourth Circuit is out of harmony and in conflict with the decision of this Court in *General Utilities and Operating Company v. Helvering* (1935) 296 U. S. 200; 80 L. Ed. 154, in that the opinion of the Court of Appeals in effect holds these defendants guilty of individual violations of the Statute although the case was tried in the court below solely on the question of conspiracy.

2. The decision of the Court of Appeals for the Fourth Circuit is out of harmony and in conflict with *Slocum v. New York Life Insurance Company* (1913) 228 U. S. 364; 57 L. Ed. 879; *Cf. Baltimore & Carolina Line v. Redman* (1935) 295 U. S. 654; 79 L. Ed. 1636; *Aetna Insurance Company v. Kennedy* (1937) 301 U. S. 389; 81 L. Ed. 1177, in that it deprives these defendants of their right to trial by jury since there was some evidence upon which verdict and judgment could be rendered in their favor.

3. The decision of the Court of Appeals for the Fourth Circuit is out of harmony and in conflict with the decisions of this Court in *Gunning v. Cooley* (1930) 281 U. S. 90; 74 L. Ed. 720 and *Richmond & Danville Railroad Company v. Powers* (1893) 149 U. S. 43; 37 L. Ed. 642 in that its opinion was to the effect that the defendants were guilty of fraud beyond all reasonable doubt even

though reasonable men could draw a contrary conclusion from the evidence produced at the trial.

4. The decision of the Court of Appeals for the Fourth Circuit is out of harmony and in conflict with the decisions of this Court in *Chaffee* v. *United States* (1874) 85 U. S. 516; 21 L. Ed. 908 (See also *Lilienthal* v. *United States* (1878) 97 U. S. 237, 271; 24 L. Ed. 901, 907) in that its opinion holds that the failure of these defendants to take the stand and testify in their own behalf or offer testimony establishes beyond all reasonable doubt their guilt under the Statute.

5. The Court of Appeals for the Fourth Circuit has misinterpreted the decision of this Court in *United States ex rel Marcus* v. *Hess, supra,* in that it held that this Court's discussion with respect to the plea of double jeopardy is controlling as to the decision whether the federal statutes authorize the survival of actions for civil damages which are penal in nature. In this respect the Court of Appeals has incorrectly decided an important question of federal law which has not been, but should be, settled by this Court.

6. No where in the opinion of the Court of Appeals for the Fourth Circuit is there a finding that all of these defendants knew the claims were false when filed nor is there a finding that all three of these defendants conspired to file the ten different claims which the Court of Appeals found to be false.

7. The Court of Appeals for the Fourth Circuit in usurping the function of the jury and finding facts which the jury in the case did not find has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the

Fourth Circuit, commanding the said Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, as provided in the Statutes of the United States, that the judgment of the Court of Appeals be reversed and the judgment of the District Court be affirmed and that petitioner be granted such other and further relief as may seem proper.

Robert H. Dye
First-Citizens Bank Bldg.
Fayetteville, N. C.

H. E. Stacy
National Bank Bldg.
Lumberton, N. C.

L. P. McLendon
Southeastern Building
Greensboro, N. C.

J. R. Nance
First-Citizens Bank Bldg.
Fayetteville, N. C.

Of Counsel:
Claude C. Pierce, Jr.
Southeastern Bldg.
Greensboro, N. C.
April 14, 1949

BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

The facts insofar as this application is concerned are sufficiently stated in the Petition.

SPECIFICATION OF ERRORS

For the errors which petitioners will urge if the Writ of Certiorari is granted, the Court is respectfully referred to that part of the petition which sets forth the questions presented (P. 9, 10) and to that part which states the reasons why the Writ should be granted (P. 10, 11).

SUMMARY OF ARGUMENT

I. These petitioners have been deprived of their right to a trial by jury, preserved to them under the Seventh Amendment of the Constitution of the United States, since the Court of Appeals for the Fourth Circuit has, in effect, held these defendants guilty of individual violations of the False Claims Statute although they were tried in the court below only on the theory of conspiring to file false claims and obtain payment from the Government thereon.

II. These petitioners have been deprived of their right to a trial by jury preserved to them under the Seventh Amendment of the Constitution of the United States since there was evidence produced at the trial upon which reasonable men could have and did find a verdict in their favor.

III. The Court of Appeals erred in holding as a matter of law that the failure of these petitioners to take the stand or offer testimony in their own behalf was evidence of guilt under the False Claims Statute.

IV. The Court of Appeals is without power to enter a judgment in favor of the respondent in this case since

that Court did not find as a fact either that all of these petitioners knew the claims were false when filed or that the defendants conspired to file claims, knowing them to be false.

V. The Court of Appeals has incorrectly decided an important Federal question with respect to the abatement of causes of action under the False Claims Statute by reason of the death of an alleged conspirator or an alleged actor in the filing of false claims. This question has not been, but should be settled by this Court.

ARGUMENT

I. *These petitioners are entitled to a trial by jury on the question of whether they were guilty as individuals under the False Claims Statute.*

The record fully discloses that at all times these petitioners have asserted their right to a trial by jury. Early in the trial of the case the petitioners were put on notice that the case was being tried solely on the question of conspiracy. This notice was given both by counsel for the respondent at the trial and the District Judge conducting the trial. Although the complaint alleged individual violations of the Statute, it was assumed by counsel for the petitioner that they could rely on the statement of counsel for respondent and the Court. Further, the evidence being produced could logically support only a charge of conspiracy to violate the Statute, since there could be falsity in the claims only in the event defendant Jones was not the owner of the equipment involved. It is true that counsel for respondent at the appropriate time tendered issues to the Judge to be submitted to the jury on the question of individual violation of the False Claims Statute by petitioners. This step, however, was taken subsequent to the time when the defendants rested their case. This attempted revival of a previous theory concerning

the case was not permitted by the Trial Court since it submitted to the jury solely the question of conspiracy under the Statute.

The opinion of the Court of Appeals fails to indicate whether that Court believed that the evidence conclusively established a conspiracy or whether that Court believed that the evidence conclusively established violations of the Statute by the petitioners as individuals and not as actors in a conspiracy. It is apparent that the effect of the Court's opinion is to hold that these defendants were individually guilty of violations of the Statute. Certainly these petitioners should be entitled to put whatever evidence they may have before a jury if the case is to be tried on the theory of individual violations of the Statute. It would seem apparent that if these petitioners are to be tried upon a different theory of the case in an appellate court, they are being deprived of their right to a trial by jury which is preserved to them by the provisions of the Seventh Amendment to the Constitution of the United States.

It has been held that a United States Court of Appeals was in error in reversing a judgment of the Board of Tax Appeals upon a point which was not presented to or argued before that Board. See *General Utilities and Operating Company v. Helvering* (1935) 296 U. S. 200; 80 L. Ed. 154. That case involved a Writ of Certiorari to the Court of Appeals for the Fourth Circuit which had recognized the correct principle of law but had believed it inapplicable to the case then considered. The Court of Appeals stated the rule in that case (74 Fed. (2d) 972) at page 976 as follows:

> "The reason for the rule, some times enforced by the courts, that an appellate court will confine itself to the issue presented and ruled upon by the court below, is based on the ground that the opposing party has no opportunity to re-

sist the new issue by amendment of the pleadings *or by additional proof.*" (Italics supplied).

Certainly these petitioners should not be deprived of their right to put in additional proof before a jury to contradict any evidence which might heretofore have been produced which would lead to the inference of guilt of individual violations of the False Claims Statute. Certainly it cannot be said that they have already been provided with this opportunity and have already enjoyed their day in court.

II. *These petitioners are entitled to a trial by jury under the provisions of the Seventh Amendment to the Constitution of the United States since reasonable men could have and did find in their favor from the evidence produced at the trial.*

In *Slocum v. New York Life Insurance Company* (1913) 228 U. S. 364; 57 L. Ed. 879, it was held that the action of the Court of Appeals for the Third Circuit in reversing a judgment for the plaintiff and directing the entry of a judgment of dismissal on behalf of the defendant was an infraction of the Seventh Amendment of the Constitution. In that case this court stated at 379, 380, 381 as follows:

> "These decisions make it plain, first, that the action of the circuit court of appeals in setting aside the verdict and assuming to pass upon the issues of fact, and to direct a judgment accordingly, must be tested by the rules of the common law; second, that while under those rules that court could set aside the verdict for error of law in the proceedings in the circuit court, and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said

that there was not an infraction of the 7th Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules, the circuit court of appeals itself determined the facts, without a new trial. Thus, it assumed a power it did not possess, and cut off the plaintiff's right to have the facts settled by the verdict of a jury."

* * * * *

"And this procedure was regarded as of real value, because in addition to fully recognizing that right, it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues. In the posture of the case at bar the plaintiff is entitled to that opportunity, and for anything that appears in the record *it may enable her to supply omissions in her own evidence, or to show inaccuracies in that of the defendant, which will rightly entitle her to a verdict and judgment in her favor.*"

It may be noted, however, that this Court in *Baltimore & Carolina Line v. Redman* (1935) 295 U. S. 654; 79 L. Ed. 1636, held that the *Slocum* case *supra* did not prevent a court of appeals from directing the entry of judgment in favor of the plaintiff upon reversal of a judgment in the plaintiff's favor where there had been a reserved decision on a motion for a directed verdict made by the defendant, if it appeared that the evidence was insufficient to support the allegations contained in the complaint. It is clear that the *Redman* case can have no application to

the case at bar since here there is evidence upon which reasonable men could have found that the defendants were not guilty of conspiring to file false claims against the Government. In *Aetna Insurance Company v. Kennedy* (1937) 301 U. S. 389; 81 L. Ed. 1177, it was held by this Court that in the absence of motions for judgments notwithstanding the verdict, the Court of Appeals for the Third Circuit was without power to reverse judgments in favor of defendants and to direct judgments for the plaintiff. Although it may be reasonable to assume that this Court would have come to a contrary opinion in the *Aetna Insurance Company* case *supra* in the event there had been motions for judgment notwithstanding the verdict, it is believed that such case has no application to the case at bar since there was sufficient evidence to support the findings of the jury in this case.

It is believed that the testimony of Government witnesses that the vehicles involved had been sold to Jones, that registration of the vehicles with the State authorities had been made in the name of Jones, that Jones had executed chattel mortgages on these vehicles in favor of the banks, that the banks charged Jones with liability for the loans made to purchase the vehicles, that the bank accounts were carried in the name of Jones, that Jones reported all the income from rental transactions, that neither Grannis nor Sloan profited personally by the arrangements, that Government investigators found nothing wrong with the arrangements, are all facts upon which a jury composed of reasonable men could find that Jones was the owner of these vehicles and that these defendants were therefore not guilty under the False Claims Statute.

In *Gunning v. Cooley* (1930) 281 U. S. 90; 74 L. Ed. 720, this Court affirmed a decision of the Court of Appeals of the District of Columbia which had affirmed a judgment in favor of the plaintiff rendered after verdict in her favor in a suit brought to recover damages by reason

of the defendant's negligence in treating the plaintiff for an ear ailment. In that case this Court stated at page 94:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury."

See also *Richmond & Danville Railroad Company* v. *Powers* (1893) 149 U. S. 43; 37 L. Ed. 642. It is clear in the case at bar that the Court of Appeals has usurped the function of the jury and in this respect has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

III. *The Court of Appeals erred in holding that as a matter of law the failure of these petitioners, in a suit charging fraud, to take the stand or offer evidence in their own behalf was evidence of guilt.*

In *Chaffee v. United States* (1874) 85 U. S. 516, 21 L. Ed. 908, this Court reviewed the instruction of a trial court to the jury in an action in debt to recover a penalty provided by the Revenue Act of June 30, 1864 against the defendants for having in their possession certain distilled spirits for the purpose of sale with the design to avoid the duties imposed thereon. In discussing the instruction there under consideration, this court said at pages 545, 546:

> "The purport of all this was to tell the jury that, although the defendants must be proved guilty beyond a reasonable doubt, yet if the government had made out a prima facie case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other

> words, the court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt."
>
> "* * * * * * * * The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection — the right to refuse to testify — into the machinery for their sure destruction."

In distinguishing and explaining the holding in the *Chaffee* case *supra* this Court said of the *Chaffee* case in *Lilienthal* v. *United States* (1878) 97 U. S. 237; 24 L. Ed. 901 at page 271 as follows:

> "Instructions of an entirely different character were given in that case; as, for example, the jury were told in effect that suspicious circumstances requiring explanation, if not explained, would supply by presumption what would be sufficient to warrant a verdict of guilty; that silence supplied, in the presumption of law, that full proof which should dispel all reasonable doubt, *making the inference to be drawn from silence one of law instead of fact.*" (Italics supplied).

It is clear from both the *Chaffee* case and the *Lilienthal* case above that the failure of defendants to take the stand and testify or offer testimony in their own behalf *can* or *may* raise an unfavorable inference against them. It is equally clear that it is error for a court to hold that such

inference must be drawn as a matter of law. It is believed that the opinion of the Court of Appeals in this case recognized the fact that a jury could draw an inference of guilt from the defendants' failure to take the stand or offer testimony in their own behalf, yet in the same opinion the Court said that such failure proved "*beyond all reasonable doubt*" that unfavorable inferences against the defendants had to be drawn. In other words, the Court of Appeals apparently held that as a matter of law guilt could be presumed from the failure of the defendants either to testify themselves or offer any testimony in their own behalf.

While perhaps it may be held that unfavorable inferences may be drawn from the failure of the defendants to testify, it is believed that such unfavorable inferences may not be drawn in this case for the following three reasons:

1. All three of these defendants had taken the stand and testified in their own behalf in a previous criminal trial under an indictment charging the same acts which form the basis of the alleged liability in this case and had been vigorously cross-examined then by government counsel. A transcript of that examination had been in possession of counsel for the respondent in this case and all of the information there obtained was available to such counsel during the course of the trial of this case.

2. Counsel for petitioners were well aware of the North Carolina State practice which permits defendants to have the closing argument before the jury where they offer no testimony or evidence on their own behalf. This practice was vigorously criticized in the opinion of the Court of Appeals for the Fourth Circuit in this case, but at best it could be held to be prejudicial error which would require a new trial and certainly cannot be grounds for the direction of a judgment in favor of the respondent.

3. The defendants were certainly entitled to rely upon the weakness of the Government case and the apparent inconsistencies of the testimony of Government witnesses.

IV. *These defendants may not be charged with liability under the False Claims Statute without a finding that all of the defendants knew the claims were false when filed or conspired to file false claims.*

It is apparent that the claims involved in this case could be false only in the event the petitioner, Jones, was not the owner of the property involved. Nowhere in the opinion of the Court of Appeals is there an express finding of knowledge or *scienter* on the part of all of the defendants. It would appear unnecessary to cite authority that guilty knowledge is a necessary ground for an action based upon fraud. It is clear that fraud or deceit is a *sine qua non* of liability under the False Claims Statute. See *United States ex. rel. Brensilber v. Bausch & Lomb Optical Company* (C. A., 2, 1942) 131 F. (2d) 545, affirmed by an equally divided Supreme Court (1943) 320 U. S. 711; 88 L. Ed. 417, reh. den. (1943) 320 U. S. 814; 88 L. Ed. 492. See also *Cahill v. Curtiss-Wright Corporation* (D. C., Ky. 1944) 57 F. Supp. 614.

V. *The cause of action against the deceased defendant Grannis under the statute abated by reason of his death after verdict and judgment in his favor and perfection of appeal by the respondent to the Court of Appeals for the Fourth Circuit.*

It is respectfully submitted that the Court of Appeals has interpreted language employed by this Court in the case of *United States ex rel Marcus v. Hess* (1943) 317 U. S. 537; 87 L. Ed. 443, and used in connection with a decision as to the pleas of double jeopardy, to be applicable in the determination of whether a civil action which authorizes the award of damages which are penal in nature survives the death of a defendant in such suit. It is believed that the Court of Appeals was contrasting penal or criminal actions with civil actions in reaching a determination as to survivability, instead of properly contrasting civil actions for remedial damages and civil actions

for damages which are penal in nature. In any event, it is respectfully submitted that the case of *Marcus* v. *Hess*, *supra*, does not decide the issue in the case at bar and that the Court of Appeals has incorrectly decided an important question of federal law which has not been passed upon, but should be settled, by this Court. Counsel for petitioners have been advised by counsel for respondent that there are presently pending approximately 969 investigations of violations under the False Claims Statutes. Individuals being investigated are certain to die and the question presented by this case may arise. Counsel for petitioners have been further advised that in addition to the cases under investigation approximately 85 cases are in litigation but that this is the only case in which the question of abatement upon death has been raised.

CONCLUSION

This is a case which merits consideration of this Court. It is respectfully urged that a Writ of Certiorari be issued herein.

Respectfully submitted,

Robert H. Dye
First-Citizens Bank Bldg.
Fayetteville, N. C.

H. E. Stacy
National Bank Bldg.
Lumberton, N. C.

L. P. McLendon
Southeastern Bldg.
Greensboro, N. C.

J. R. Nance
First-Citizens Bank Bldg.
Fayetteville, N. C.

Of counsel:
Claude C. Pierce, Jr.
Southeastern Bldg.,
Greensboro, N. C.
April 14, 1949.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 24 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 728

RUBY JEAN GRANNIS AND THE BRANCH BANKING AND TRUST COMPANY, FAYETTEVILLE, NORTH CAROLINA, ADMINISTRATORS OF THE ESTATE OF EDWARD W. GRANNIS, DECEASED, KARL SLOAN AND WILLIAM R. JONES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

Robert H. Dye
H. E. Stacy
L. P. McLendon
J. R. Nance
Attorneys for Petitioners.

Of Counsel:
Claude C. Pierce, Jr.

JUDD & DETWEILER, PRINTING COMPANY, INCORPORATED, WASHINGTON, D. C.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1948

No. 726

RUBY JEAN GRANNIS AND THE BRANCH BANKING AND TRUST COMPANY, FAYETTEVILLE, NORTH CAROLINA, ADMINISTRATORS OF THE ESTATE OF EDWARD W. GRANNIS, DECEASED, KARL SLOAN AND WILLIAM R. JONES,

Petitioners.

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

I

The respondent has argued in its brief in opposition to the petition for writ of certiorari filed by the petitioners in this case that no question for certiorari has been presented because as a factual matter there is no foundation in the record for the asserted denial of the right to a jury trial (Br. 15). The respondent argues that the case was tried in the trial court, both on the theory of individual fraudulent acts and a conspiracy to defraud the United States (Br. 16). With respect to these petitioners' contention that the

case was tried on the issue of conspiracy only, it is stated by the respondent that the only supporting reference cited by petitioners relates to the statement made by Government counsel in connection with the admissibility of evidence (Br. 16). In this respect the respondent completely overlooks the fact that at the time this statement was made the trial court reiterated the Government's theory that the case was limited to a conspiracy charge only, and there was no objection on the part of Government counsel to the court's characterization of the case at that time, (R. 67; Tr. 67).

Although the complaint set forth the charges of both individual and conspiracy violations (R. 5) and the Government attempted to have the charges of violations in both respects submitted to the jury (R. 16-17), it is still apparent from the evidence submitted by the Government that the only possible charge which could be supported would be the conspiracy charge. There could be falsity in the claims only in the event Jones was not the owner of the property involved and false claims showing him to be the owner could only result from a conspiracy.

It is evident that the respondent is laboring under a patent misunderstanding of the case at bar in that it apparently believes that if the defendant Jones was the actual owner of the equipment involved in this case, either a conspiracy charge or individual fraudulant actions could be supported (Br. 18). This misunderstanding arises from a misconception of third party rental agreements which permitted a third party renter to use a higher valuation than actual cost to him in determining the amount upon which rentals and recapture were to be based. The Court of Appeals for the Fourth Circuit clearly recognized the government practice of permitting valuation of third party rental equipment in excess of actual cost (R. 101-102). The respondent in its brief at page 18 states as follows:

> "But even if reasonable men could find that Jones was the actual owner of the equipment the result would be

> the same. Although this might raise some question of the effect of Grannis' obligations to obtain all available discounts and rebates for the Government and to act at all times to best serve the Government's interest, it would not change the character of the misrepresentations of the actual cost and value of the equipment upon which the false claims were made and paid."

The respondent is apparently unaware of the record if it contends that the defendant Jones was required to value his property, put upon third party rentals, at actual cost to him. This is contrary to a letter of instruction issued by the office of Quartermaster General (R. 47-49). Under the Jones rental agreement the valuation placed thereon by the third party renter was to be deemed final unless within ten days after the equipment had been set up and was operating, the lessee or contracting officer or his duly authorized representative modified such valuation (R. 64). The testimony of a government witness showed that the valuation of such equipment was not questioned by the Government, but in fact approved. (R. 72-75). This same government witness further testified that a third party renter was en titled to put full replacement price, or full retail price, as the proper valuation, and was not limited to actual cost (R. 75). It was further clear from the testimony of government witnesses that the prices charged Jones and paid for the automobiles in question were less than retail prices (Tr. 195, 220, 229).

The respondent in its brief characterizes this case as one in which the evidence leaves no room whatever for honest differences of opinion (Br. 18) and quotes from the dissenting opinion in *Galloway v. United States,* 319 U. S. 372, at 407. This same dissenting opinion contains the following language at 406-407:

> "The language of the Seventh Amendment cannot easily be improved by formulas. The statement of a dis-

trict judge in Tarter v. United States (DC) 17 F Supp 691, 692, represents, in my opinion, the minimum meaning of the Seventh Amendment:

" 'The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is substantial evidence to support the claim of the plaintiff in an action. *If a single witness testifies to a fact sustaining the issue between the parties, or if reasoning minds might reach different conclusions from the testimony of a single witness, one of which would substantially support the issue of the contending party, the issue must be left to the jury. Trial by jury is a fundamental guaranty of the rights of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials.*' " (Italics supplied)

Nothing could be clearer than this case is one in which reasoning minds might reach different conclusions from the testimony of a set of witnesses presented by a party in a case. The history of this case shows that a learned trial judge honestly believed reasoning minds might reach different conclusions than that urged by the Government in this case upon the testimony of its witnesses. The history of this case bears out the judge's belief since in fact a jury, composed of reasonable men, honestly believed that the Government failed to establish by the greater weight of the evidence that these defendants were guilty of conspiracy to file fraudulent claims with the United States.

Briefly this case presents the sharp question whether the Courts of Appeals was *compelled* to enter judgment for the Government even though the evidence produced by the Government established the following catalog of facts, both favorable and unfavorable to the Government.

Evidence Tending to Support Government Theory	*Evidence Tending to Support Jury Verdict*
1. Banks furnishing funds required a guarantee from Grannis (R. 94).	1. Title to vehicles was registered in Jones in compliance with State law (R. 95).
2. Grannis deposited $20,000 in the Jones bank account used for the purchase of vehicles (R. 94).	2. Jones executed chattel mortgages in favor of the banks furnishing the purchase money to secure the purchase price (R. 94).
3. Grannis, or an associate, negotiated the purchase of vehicles (R. 94-95).	3. Jones executed the notes to the banks as evidence of the loans made for the purchase of vehicles (Tr. 260, 270, 282).
4. Sloan negotiated the bank loans for Jones (R. 94).	4. Jones reported all the income from rentals in his income tax returns (R. 54-55).
5. Sloan controlled the Jones bank account during the duration of the indebtedness for the purchase price of the vehicles (R. 94).	5. Neither Grannis nor Sloan profited by the transaction (R. 55).
6. Fleet discounts for Jones were obtained in the name of Grannis (R. 95).	6. All records of the transaction were either semi-public or preserved and given freely to Government investigators (R. 55-56).

It is obvious that the selection by the court below of the facts favorable to the Government as a basis for its conclusion

constituted an invasion of the province of the jury. The facts favorable to the Government might justify a jury verdict in its favor, but do not compel the findings of the court of appeal. *Upon this state of the evidence for the court below to find beyond all reasonable doubt against these petitioners and therefore be compelled to enter judgment for the Government renders the constitutional guarantee of trial by jury meaningless.*

II

The respondent has argued that no conflict is asserted and that therefore the determination in this case does not warrant review by this court (Br. 19). However, in view of the number of possible litigants who may be interested in the outcome of this case in addition to the parties thereto, it is believed that the fundamental questions of constitutional law and jurisprudence which are involved warrant consideration by this court. Certainly some, if not all, of the possible litigants involved in approximately 969 investigations of violations under the False Claims Statute would like to know whether the decision of the Court of Appeals in this case represents valid law. In the event the determination of the Court of Appeals in the case remains undisturbed, it can stand for the following propositions:

1. The location of title to, or ownership of, personal property may be ignored in a case where the alleged falsity in a proceeding under the False Claims Statute relates to representations as to such title and ownership.

2. Individuals having contracts with United States Government assist *at their peril* relatives by marriage in the obtaining of credit, since such relatives may at a later date receive payments from the United States for equipment leased and if purchased from funds sup-

plied by such relatives, as a matter of law, such circumstances establish liability under the False Claims Statute.

3. Rulings of a trial judge in accordance with State practice, if subject to criticism, although not erroneous, somehow color the evidence in favor of the party producing it, and justify an appellate court in depriving the adverse party of a trial by jury.

4. Even where evidence produced by a party at the trial is favorable to an adverse party, it is not a contravention of the Seventh Amendment to the Constitution of the United States for a reviewing court to disregard the findings of the trial judge and the jury based upon such favorable evidence.

5. The failure of defendants to take the stand or offer testimony in their own behalf in a proceeding under the False Claims Statute prevents submission of the case to the jury.

6. As a matter of law a defendant's failure to take the stand or offer testimony in his own behalf in a proceeding under the False Claims Statute establishes liability.

7. It is unnecessary to show knowledge of the falsity of claims in a proceeding under the False Claims Statute.

If any of the above propositions are legally valid, none of the parties involved in the 969 investigations should risk litigation in their cases. Further, every third party rental voucher filed with the Government should be investigated for a determination of the source of the funds which enabled the owner to purchase such equipment—there may be a brother-in-law involved.

For the reasons stated in the petition, brief and this reply, the petition for writ of certiorari should be granted,

the judgment of the Court of Appeals should be reversed and the judgment of the District Court should be affirmed.

Respectfully submitted
Robert H. Dye
First-Citizens Bank Bldg.
Fayetteville, N. C.
H. E. Stacy
National Bank Bldg.
Lumberton, N. C.
L. P. McLendon
Southeastern Bldg.
Greensboro, N. C.
J. R. Nance
First-Citizens Bank Bldg.
Fayetteville, N. C.
Attorneys for Petitioners.

Of Counsel:
Claude C. Pierce, Jr.
Southeastern Bldg.
Greensboro, N. C.
May 23, 1949

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed three (3) copies of the foregoing reply brief on behalf of petitioners, postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.

This 23rd day of May, 1949.

Claude C. Pierce, Jr.
Of Counsel for Petitioners.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement:	
1. Proceedings below	4
2. The uncontradicted facts	5
a. Pertinent contract provisions	5
b. Transactions relating to false claims filed	7
c. Resulting overpayments	11
3. The judgments below	11
Argument	14
Conclusion	21

CITATIONS

Cases:	
Brady v. *Southern Ry. Co.*, 320 U. S. 476	18
Cone v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212	15
Fountain v. *Filson*, No. 542, O. T. 1948, decided April 18, 1949	15
Galloway v. *United States*, 319 U. S. 372	18
Globe Liquor Co. v. *San Roman*, 332 U. S. 571	15
Montgomery Ward & Co. v. *Duncan*, 311 U. S. 243	18
United States ex rel. Marcus v. *Hess*, 317 U. S. 537	14, 18, 20
Statutes:	
Revised Statutes: Secs. 3490 and 5438 (31 U. S. C. 231)	2
28 U. S. C. 2404	4
Miscellaneous:	
Cong. Globe, 37th Cong., 3d sess., p. 958	20
Federal Rules of Civil Procedure: Rule 50	15

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 726

RUBY JEAN GRANNIS AND THE BRANCH BANKING AND TRUST COMPANY, FAYETTEVILLE, NORTH CAROLINA, ADMINISTRATORS OF THE ESTATE OF EDWARD W. GRANNIS, DECEASED, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

There was no opinion in the district court. The judgment on the verdict of the jury appears at page 49 of the record. The order denying respondent's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial appears on page 58 of the record. The opinion of the Court of Appeals for the Fourth Circuit (R. 91-106) is reported at 172 F. 2d 507.

JURISDICTION

The judgment of the Court of Appeals was entered February 3, 1949 (R. 106). The petition for rehearing, filed February 26, 1949, was denied on March 7, 1949 (R. 123). The petition for a writ of certiorari was filed on April 15, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the United States tried the case solely on the theory of a conspiracy to violate the false claims statute and whether the judgment of the court below was based exclusively on a theory of individual violations of the statute.

2. Whether, in view of the uncontradicted testimony of Government witnesses and the absence of any evidence offered by defendants, there was any controverted issue of fact in the circumstances of this case which entitled defendants to a jury trial.

3. Whether an action by the United States for damages and forfeitures under the false claims statute is preserved against abatement upon the death of a defendant by 28 U. S. C. 2404 as a civil action for damages commenced by the United States.

STATUTES INVOLVED

Section 3490 and Section 5438 (for the purpose of Section 3490) of the Revised Statutes (31 U. S. C. 231) provide in pertinent part as follows:

> SEC. 3490. Any person not in the military or naval forces of the United States, or in the

militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "Crimes," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

SEC. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less

than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.

28 U. S. C. 2404 provides as follows:

> A civil action for damages commenced by or on behalf of the United States or in which it is interested shall not abate on the death of a defendant but shall survive and be enforceable against his estate as well as against surviving defendants.

STATEMENT

1. *Proceedings Below.*

This suit was brought by the United States to recover damages and forfeitures for violation of the false claims statute (R. S. 3490, 5438, 31 U. S. C. 231) (R. 1, 7). After the Government put in its case, the defendants moved for a directed verdict (R. 68). This motion was denied and the defendants declined to offer any testimony (R. 68, 69). The Government's motion for a judgment on the evidence produced, in the absence of any contradicting evidence offered by defendants, was denied (R. 69). The jury returned a verdict for the defendants and the court entered judgment on the verdict (R. 49). The Government's motion for judgment notwithstanding the verdict and, in the alternative, for a new trial was denied (R. 50, 58). During the pendency of the appeal one of the defendants died and his administrators were substituted (R. 84, 126). On appeal the court below adverted to numerous prejudicial errors committed by the trial court, found that the

Government's uncontradicted evidence established the defendants' liability beyond question, and directed the entry of judgment for the United States in the amount of $84,710.06 (R. 91-106).

2. *The Uncontradicted Facts.*

The following facts, which are recited in the opinion of the court of appeals, are based upon the uncontradicted evidence:

The three defendants were Grannis, Sloan, and Jones (R. 1). Grannis and three others, not involved here, entered into a cost-plus-a-fixed-fee contract with the United States on December 10, 1940, for the construction of an anti-aircraft firing center at Wilmington, North Carolina, known as Camp Davis (R. 92). Sloan was Grannis' office manager and subject to his control (R. 92). Jones was Grannis' brother-in-law (R. 92).

a. *Pertinent Contract Provisions.* A fixed fee of $270,942, in addition to reimbursement for expenditures and rental for equipment, was to constitute complete compensation for the contractor's services including profit and overhead expenses (R. 92). The contractor was required "to the extent of his ability [to] take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications" and was required to deduct all such amounts "in determining the actual net cost of articles and materials of every kind required for the purpose of this contract" (R. 4, 9, 92). These amounts were required to be

deducted whether actually taken or not if they would have been allowed "except for the fault or negligence of the contractor" (R. 4, 9, 92). The contractor further agreed "at all times [to] use his best efforts in all acts hereunder to protect and subserve the interests of the government" (R. 5, 9).

Under the contract rental for equipment owned by the contractor was to be based on actual cost for new equipment and replacement cost new for used equipment (R. 93). When the total rental paid equalled the value of the equipment, plus one per cent per month during its use, title vested in the Government and no further rental was to be paid (R. 92-93). The rental schedule for the contractor's equipment allowed reimbursement for depreciation, taxes, insurance, storage, and interest on the investment, but excluded profit (R. 93).

Rental paid for the use of equipment owned by third parties was allowed as an expenditure under the contract (R. 93). The rental contract with a third party was required to provide for vesting title in the Government when the total rental paid equalled the value placed on the equipment (R. 93). Third party rental charges, however, contemplated a profit to the owner, and third parties were not required to account for rebates received in the purchase of equipment (R. 93). Thus the rental allowed the contractor for third party equipment exceeded rental allowed for his own equipment (R. 93).

b. *Transactio*[n]*s Relating to False Claims Filed.*

Shortly after w[ork] under the contract began in December, 1940, [a] rental agreement was executed between Jones a[nd] the contractor, and 130 automobile trucks a[nd] cars were entered on the rental rolls in the nam[e] of Jones (R. 93). A separate schedule for ea[ch] of the 130 cars, initialed by Jones and the [the] contractor's representative,[1] was attached to the [the] agreement (R. 93, Tr. 82, 93).[2]

At the time o[f] these transactions, Jones was not in the automob[ile] business and did not own any automobile truc[ks] or cars (R. 94). He had neither the financial ab[il]ity nor bank credit to enable him to finance the p[ur]chase of this equipment (R. 94). Grannis, one o[f] the contractors, through his office manager, in f[act] furnished all the funds and financing nece[ssary] to acquire the equipment which was repr[esented] to be the property of Jones. The cars and [trucks] involved were purchased through accou[nts] established by Sloan in two banks at Fayet[teville, North Carolina, in the name] of "W. R. Jone[s by K. Sloan" (R. 94). The funds] for these accou[nts] were provided by bank loans totalling $77,0[91.37] which were guaranteed by Grannis and b[y a] cash deposit in the amount of

---

[1] The court's o[pinion] inadvertently refers to the Government's representa[tive] instead of the contractor's representative (R. 93).

[2] "Tr." referen[ces] are to the transcript on file with the Court. See Stipul[ation, R. 124-125.]

$20,000 made by Grannis (R. 94). Jones had nothing to do with negotiating the loans and supplied no funds for the bank accounts (R. 94). Sloan controlled these accounts and was the only one authorized to draw checks on the accounts (R. 94). Although the accounts were in his name, Jones had no authority to make withdrawals (R. 94). Checks for rental of the equipment were forwarded by the contractor (Grannis and his co-adventurers) to Jones addressed to the post office box of Grannis and came into the possession of Sloan who deposited them in the accounts (R. 94).

Grannis and Sloan purchased the 130 vehicles in question without any participation by Jones and arranged to have the titles taken in the name of Jones although ownership was clearly in Grannis. The vehicles were then listed in the rental schedules attached to the Jones rental agreement at values greatly in excess of their cost to Grannis. Although the schedules for the first 80 items called for only the value of the equipment, the schedules for the remaining 50 included both value and cost new (R. 93-94). In either event, a figure substantially in excess of actual cost was always entered (R. 94).

In December 1940 a Chevrolet dealer at Fayetteville received an inquiry for new trucks from Grannis' office at Wilmington and offered him 25 used trucks (R. 95). Grannis came from Wilmington to Fayetteville with two Army officers, in-

spected the trucks, and ordered them delivered to Camp Davis (R. 95). On delivery, Sloan instructed the dealer to invoice them to Jones and title was taken in Jones' name (R. 95). Payment was made by checks signed "W. R. Jones by K. Sloan" (R. 95). Jones took no part whatever in the transaction (R. 95).

During January and February 1941, 54 Ford trucks and automobiles were purchased by Grannis from another dealer and placed on the rental rolls at Camp Davis under the Jones rental agreement (R. 95). Negotiations for the purchase were made by Grannis or Sloan (R. 95). The invoices, paid for out of the "W. R. Jones by K. Sloan" account, were made out in the name of Grannis but titles were obtained in the name of Jones (R. 95). As a fleet owner and purchaser of automobiles, Grannis was given a discount from the retail price but the equipment was scheduled at the higher price (R. 95). Three-quarter ton trucks invoiced to Grannis at $575 each were placed on the Jones rental schedule at $792 each; sedans invoiced to Grannis at $736.50 were placed on the Jones rental schedule at $951 (R. 95). Grannis obtained additional discounts under a fleet owner's agreement by certifying to the Ford Motor Company (Tr. 198-199, 234-235) that he was the purchaser and owner of the cars and by agreeing not to resell them (R. 95). The additional discounts Grannis obtained on these 54 cars and 23 other cars by certifying

he was the purchaser and owner totalled $1541 (R. 95).

In February 1941, Grannis or Sloan bought over the telephone five Ford pick-up trucks and one station wagon at a discount from the regular retail list price (R. 95). The invoice issued in the name of Jones showed a sales price of $560 each for the five trucks and $848 for the station wagon (R. 95). The trucks were listed on the Jones rental schedule at $792 each and the station wagon at $1207 (R. 95-96). Payment for the cars was by check on the "W. R. Jones by K. Sloan" account (R. 96).

In January and February 1941, the sale of 17 Ford cars and trucks were shown on the dealer's books as made to W. R. Jones with a notation to charge Grannis (R. 96). The invoice showed the sales price $567.50 for each of the Ford trucks and $737.85 for the sedans (R. 96). The Jones rental schedule showed that the cost new of these vehicles was $792 each for the trucks and $990 for the sedans in December 1940 (R. 96).

In January 1941, Sloan, acting for Grannis, negotiated for the purchase of 28 new Plymouth cars, and after the delivery of the first of these cars to Camp Davis, Sloan instructed the dealer to invoice the cars in the name of Jones and payment was made by checks signed "W. R. Jones by K. Sloan" (R. 96). The invoice showed the sales price as

$742.95 each while the Jones rental schedule showed a cost new and present value of $951 (R. 96).

c. *Resulting Overpayments.* All of the 130 cars and trucks except 5 were taken over by the Government in accordance with provisions of the contract at the values listed on the Jones rental schedules plus one per cent per month during their use (R. 96). Claims for reimbursement or payment of the rentals and recapture of the cars and trucks were presented to the Government in 10 vouchers and these claims were paid by the Government (R. 96). On the 125 cars taken over, the United States paid $28,914.71 more than it would have paid if the cars had been placed on the rental schedules as the property of Grannis at valuations based on actual cost to him (R. 96). This, together with overcharges of rentals on the 5 cars not taken over and the sum of $1,541 which Grannis received as a rebate from the Ford Motor Company but failed to account for to the United States as required by the contract, resulted in total overpayments by the United States of $32,355.03 (R. 96-97).

3. *The Judgments Below.* After denial of the Government's motion for a directed verdict, the district judge submitted the case to the jury under instructions which required it to find a conspiracy in order to find in favor of the Government (R. 97). The jury found by its verdict that no two defendants had conspired to defraud the United States and under the judge's instructions this put an end to the case (R. 97).

On appeal the court below found that the verdict, "which was surprising in view of the failure of the defendants to testify themselves or to offer any explanation of their conduct" (R. 98), might be explained by the following incidents of the trial: (1) over the Government's objections the special defense that the suit was barred because the defendants had been acquitted under a criminal indictment based upon identical matters was read to the jury (R. 98); (2) the instructions given to the jury minimized the failure of the defendants to testify or offer any testimony whatsoever (R. 99); and (3) defendants were permitted to have the opening and closing argument before the jury (R. 100).

The court held it was required to direct the entry of judgment for the United States under the rule that a verdict should be directed "when the facts are so convincing that reasonable men could not differ as to their significance" particularly "when there is no conflict in the evidence" (R. 100-101). The court stated that (R. 101):

> The mere recital of the uncontradicted facts shows beyond all reasonable doubt that the cars and trucks, ostensibly rented to the contractors as the third party equipment of Jones, actually belonged to Grannis, and were listed in Jones' name so as to fraudulently increase the rental payable by the United States. Jones himself was unable to finance the business; the negotiations for the purchase of the cars were conducted by Jones [3] and Sloan; the discounts on

[3] Grannis was obviously intended rather than Jones. See R. 102.

> the purchase price were claimed and allowed on the assumption that Grannis was the buyer; the rebate on the purchase price of the Ford cars was paid to and retained by Grannis; the arrangements with the banks for financing the purchases were made by Grannis and Sloan; the purchase money was furnished by Grannis or borrowed on his credit; the monies on deposit in the banks were subject to withdrawal only by Sloan, and the checks from the rentals paid by the United States were delivered to Sloan and deposited in the banks, subject to his order.

The result would be the same, the court pointed out, even if the cars were technically the property of Jones, in view of the contractor's obligation to use his best efforts in all acts under the contract to protect and to subserve the interest of the Government, the overstatement of the valuation of the equipment, and the misstatement of its cost in the schedules prepared and submitted by defendants in support of the claims filed (R. 102).

After holding that the uncontradicted facts demonstrated "beyond all reasonable doubt" that the defendants had participated in the filing of false claims against the United States (R. 101), the court stated further that "the unfavorable inferences against the defendants, which are justified by these facts, are fortified beyond all reasonable doubt by the failure of the defendants either to testify themselves or to offer any testimony on their own behalf" (R. 103).

During the pendency of the appeal, the defendant Grannis was killed in an airplane accident (R. 84) and the administrators of his estate were substituted (R. 126). The court below rejected the special defense that the suit abated as one based upon a penal statute (R. 103-105). In reliance upon *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, a suit for damages under R. S. 3490 was held to be a civil action and therefore within the saving provisions of 28 U. S. C. 2404 (R. 103-104).

The court held that the Government was entitled to recover double the sum of its actual damages of $32,355.03, namely $64,710.06, and an additional amount of $2,000 for each of the 10 vouchers covering the fictitious claims based on the Jones rental schedules presented to the United States, for a total of $84,710.06 together with costs (R. 105-106). The judgment of the district court was reversed and the case remanded with direction to enter judgment for the United States in this amount (R. 106).

ARGUMENT

1. Petitioners assert they have been denied their constitutional right to a jury trial because (1) the Government tried the case on a theory of conspiracy to violate the false claims statute but judgment was awarded on the basis of individual violations of the statute, and (2) judgment notwithstanding the verdict was directed to be entered for the United States although there was some evidence from which reasonable men could find

a verdict for defendants. No question of compliance with the procedural requirements of Rule 50 of the Federal Rules of Civil Procedure is raised by the petition. The Government moved for a directed verdict at the close of the evidence and for judgment notwithstanding the verdict within 10 days after the verdict was returned (R. 50, 58, 69). Cf. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212; *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571. Moreover, the petition does not rely upon any legal principle with respect to the right to a jury trial with which we disagree. We would agree that where different facts were involved a judgment directed on one theory in a case tried on another would be improper. Cf. *Fountain* v. *Filson*, No. 542, this Term, decided April 18, 1949. We would also agree that if there was room for an honest difference of opinion over any of the factual issues in controversy the question should have been committed to the determination of a jury. We believe no question for certiorari is presented, however, because as a factual matter there is no foundation in the record for the asserted denial of the right to a jury trial or for the other errors alleged with respect to the judgment on the evidence.

a. The first reason assigned for the granting of the writ is that the court of appeals held each of the defendants had individually violated the false claims statute "although the case was tried in the court below solely on the question of conspiracy"

(Pet. p. 10). There is no foundation in the record, however, for the assertion either that the case was tried "solely on the question of conspiracy" or that the court below based its judgment on a theory of individual violations of the false claims statute.

The Government based its case throughout the trial on the theory of both individual fraudulent acts and a conspiracy to defraud the United States. This position was consistently made clear and it is difficult to understand how anyone could possibly have thought otherwise. The complaint plainly sets forth the charges of individual and conspiracy violations (R. 5). The charges of violations in both respects were read to the jury (R. 12). During the course of the trial, government counsel referred to the case as having an "element of conspiracy" (Tr. 60) and left no doubt in the mind of the judge that its case did not depend upon proof of a conspiracy (Tr. 457). The issues tendered by the Government for submission to the jury again made clear its reliance upon both individual and conspiracy violations (R. 16-17). There is, therefore, no basis whatever for petitioners' bald assertion that the case was tried solely on the theory of conspiracy.

The only supporting reference (R. 67) cited by petitioners (Pet. p. 2) relates to the statement made by government counsel in connection with the admissibility of evidence that "this is a conspiracy case" which, of course, it was. The charge

of conspiracy in the complaint obviously would bring into play rules of evidence pertinent to conspiracy cases. But this falls far short of even suggesting that the Government was abandoning its allegations of individual violations. Moreover, even if the Government had abandoned all but the conspiracy charges, it cannot be said that the court below based its judgment on a theory of individual violations. The opinion does not specifically state whether its holding was predicated upon individual or conspiracy violations. Its language seems to make clear, however, its view that both charges were established beyond question by the uncontradicted evidence (R. 91-103).

b. Petitioners' assertion that it was deprived of a jury trial because there was some evidence from which reasonable men could find a verdict in their favor is similarly not supported by the record. As previously pointed out, the defendants did not testify themselves and offered no evidence. There is therefore no problem of weighing the credibility of witnesses or resolving conflicts in the evidence. All of the essential elements of the Government's cause of action were established by uncontradicted testimony. Misrepresentations were made to the Government with respect to the true ownership of the equipment and with respect to its cost and value. Rebates and discounts to which the Government was entitled were concealed. Claims embodying these misrepresentations and concealments were filed and paid by the Govern-

ment. All of the defendants contributed to the misrepresentations and the filing of the false claims. On these facts defendants were liable to the United States under the false claims statute as a matter of law. *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537.

Petitioners urge a different interpretation of ownership although they offered no testimony to explain the undisputed evidence. But even if reasonable men could find that Jones was the actual owner of the equipment the result would be the same. Although this might raise some question of the effect of Grannis' obligations to obtain all available discounts and rebates for the Government and to act at all times to best serve the Government's interest, it would not change the character of the misrepresentations of the actual cost and value of the equipment upon which the false claims were made and paid. This is clearly a case, therefore, in which "without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy." *Galloway* v. *United States,* 319 U. S. 372, dissenting opinion at 407. The granting of judgment notwithstanding the verdict in these circumstances does not deprive petitioners of a jury trial. See *Galloway* v. *United States, supra,* majority and dissenting opinions; *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, 254; *Brady* v. *Southern Ry. Co.,* 320 U. S. 476, 479-480.

c. Petitioners also contend that error was committed by the court below "in holding that the failure of these defendants to take the stand and testify in their own behalf or offer testimony proves beyond all reasonable doubt their guilt under the statute" and in directing a judgment for the United States without finding that the defendants knew the claims were false (Pet. pp. 9-10). The fact is that the court below did not depend upon the failure of defendants to testify or offer testimony to establish the Government's cause of action. Relying entirely on the Government's affirmative and uncontradicted evidence, the court found that a fraud had been perpetrated upon the United States "beyond all reasonable doubt" (R. 101). It added thereafter that "the unfavorable inferences against the defendants, which are justified by these facts, are *fortified* beyond all reasonable doubt by the failure of the defendants either to testify themselves or to offer any testimony on their own behalf." (Emphasis supplied, R. 103.) With respect to the defendants' knowledge of the falsity of the claims filed, the court's opinion makes unmistakably clear that no innocent or inadvertent misrepresentations were involved in the case. See particularly R. 101-103.

2. The court below correctly held that the action did not abate with respect to defendant Grannis upon his death. No conflict is asserted, and this determination does not warrant review by this Court. 28 U. S. C. 2404 specifically provides that

"A civil action for damages commenced by or on behalf of the United States * * * shall not abate upon the death of a defendant." *Supra*, p. 4. In *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, this Court held that a suit under the same statute involved in this case "does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered" and that "the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole" (pp. 550, 551-552). This holding of the Court, together with the language of the statute, is dispositive of the question urged for review. Although the *Hess* case dealt with the question of double jeopardy, its conclusion with respect to the nature of the action is equally applicable here. Moreover, there is no reason to believe that Congress was less concerned with making the Government whole where it suffered monetary damage through the filing of fraudulent claims than in other cases of monetary damage. In fact, it appears that in the enactment of the provisions here involved, Congress contemplated that the Government might pursue its remedy not only against a fraudulent contractor but also against "his estate and his heirs" to recover "the money of which it is defrauded." Cong. Globe, 37th Cong., 3d sess., p. 958.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

SAMUEL D. SLADE,
MORTON LIFTIN,
Attorneys.

May, 1949

☆ U. S. Government Printing Office, 1949 836330/600